

**Posted: 11/4/99  
4:15 p.m.**

**Order 99-11-4**



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 4<sup>th</sup> day of November, 1999

**Served: November 4, 1999**

**Application of**

**MIDWEST EXPRESS AIRLINES, INC.**

**Docket OST-99-6240**

For an exemption from 14 CFR Part 93, under  
49 U.S.C. 41714

**ORDER GRANTING EXEMPTION**

**SUMMARY**

By this order the Department is granting the application of Midwest Express Airlines, Inc. (Midwest Express) for an exemption to permit it to reassign certain slots at Ronald Reagan Washington National Airport (Reagan National) to alternative times.

**APPLICATION**

On September 17, 1999, Midwest Express filed an application for an exemption to slide two 9:00 p.m. (2100) Reagan National slots that it had recently acquired to more desirable times. Midwest Express proposes to move, or "slide", one of the slots to the 2:25 p.m. (1425) period and the other to the 3:00 p.m. (1500) period for nonstop service to and from Milwaukee, WI, commencing February 1, 2000.

In support of its application, the carrier states that it complies with all of the conditions specified in 49 U.S.C. 41714(d), which authorizes the Department to grant exemptions to air carriers operating or holding slots at Reagan National if such conditions are met. In addition, Midwest Express asserts that its request meets the exceptional circumstances test required by statute and defined by Department guidelines and precedent, in that it will enable expanded schedules, with Stage 3 aircraft, in an underserved market, benefiting a large number of consumers. The carrier notes that it has developed a strong Milwaukee hub, from which it and its regional affiliate, Skyway Airlines, serve 52 nonstop destinations. By comparison to other Reagan National major carriers, however, Midwest Express contends that it suffers a competitive disadvantage because its lack of well-timed slots prevents it from meeting the demand

between its principal hub and Reagan National. Its Washington-Milwaukee service is limited to three round trips a day, with average load factors of 68 percent and peak-month load factors of 80 percent.<sup>1</sup> Thus, it asserts that the slot slide proposed under this application would enable a fourth daily round trip, for an underserved market that generated over 123,000 origin-and-destination passengers in 1998 and has no other nonstop service. The applicant projects, based on the market's size, growth and connecting traffic, that the proposed service will be operationally and financially viable. It also states that, because there will be no net increase in the number of slots authorized for DCA under the High Density Rule, there will similarly be no increase in noise impacting the area surrounding the airport.

Midwest Express adds that grant of its application would be consistent with precedent established in Order 94-9-49, where the Department granted Midwest Express a similar request to slide slots to more useable times for service between Reagan National and Omaha, Nebraska. There the Department cited Congress's intent that the pertinent exemption authority apply only to meet the specific needs of carriers holding a limited number of slots at Reagan National and to enhance competition. Midwest Express now operates only ten slots at Reagan National, and it asserts that there is a pressing need for additional Milwaukee-DCA nonstop service.

Finally, Midwest Express represents that it has sought to no avail to acquire slots at the requested times through the buy-sell mechanism, but that slots at these key times are not available.

## **RESPONSIVE PLEADINGS**

On September 24, the Air Carrier Association of America (ACAA) filed an answer opposing the application. ACAA objects to the process through which Midwest Express acquired the two slots at issue, specifically the offer of slots to a carrier that already has a presence at Reagan National, without opportunity for other new entrants to seek them through a public process. ACAA argues that 14 C.F.R. § 93.225 requires that any unused slots be distributed through a lottery, and urges the Department to recall and reallocate through a lottery all 2100 slots that were temporarily allocated over the past five years.

On September 29 the Metropolitan Washington Airports Authority (MWAA) also filed an answer. MWAA states that it has no objection to the application as filed, but reiterates the statutory requirement that grant of the application must not result in an increase in the total number of slots between 7:00 a.m. (0700) and 9:59 p.m. (2159).

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<sup>1</sup> By contrast, major carriers are able to offer substantially more service between Reagan National and their major hubs. American and United offer 13 and 17 round-trip flights a day, respectively, to Chicago O'Hare, and American also operates 13 flights a day to Dallas/Fort Worth. In addition, Northwest offers 10 Detroit flights and 8 Minneapolis flights a day, and TWA offers 8 flights a day to St. Louis.

On September 29, Midwest Express filed a reply to ACAA's pleading to clarify the process through which it obtained the two slots at issue. It states that it is not accurate that Midwest Express was responding to "an offer" of slots from the FAA; rather, it states that it learned of the availability of unused Reagan National slots as a result of its own inquiry to the FAA. Midwest Express contends that it has been standard industry practice for air carriers independently to make these queries periodically since off-peak Reagan National slots occasionally become available on a temporary basis. The carrier argues that this process is common knowledge in the airline industry and that several air carriers have used this procedure to obtain slots.

On October 1, ACAA filed a response to Midwest Express's reply, together with a motion for leave to file.<sup>2</sup> ACAA reiterated that the relevant slots are temporary and that, under the FAA's own regulations (14 C.F.R. 93.225), available slots must be distributed through a lottery system. Thus, ACAA asserts that the FAA should reclaim the 9:00 p.m. slots temporarily given to Midwest Express and reallocate them.

## DECISION

We have decided to grant Midwest Express's application.

Under 49 U.S.C. 41714(d) the Department may, under circumstances that it finds to be exceptional, grant exemptions to an air carrier that holds or operates slots at Reagan National to enable it to slide the operating times of slots to different times. Such exemptions are very limited and must meet explicit conditions. Under present practice, the Department must find that grant of the authority would not (1) result in an increase in the total number of slots per day at Reagan National; (2) result in an increase in the total number of slots at Reagan National from 0700 to 2159; (3) increase the number of operations at Reagan National in any one-hour period by more than two operations; (4) result in the withdrawal or reduction of slots operated by an air carrier; or (5) result in a net increase in noise impact on surrounding communities resulting from changes in timing of the exempted operations.

Midwest Express's proposed slides will not result in a net increase in the total number of authorized slots at Reagan National during any day. Rather, it will decrease by two the number of operations that have been authorized in the 2100 period and will result in net increases of one authorized operation in each of the 1400 and 1500 periods. No other airline's slot holdings will be affected. And, because Midwest Express will be merely changing the timing of two operations, there will be no net increase in noise impact on the communities surrounding the airport. Thus, the proposal meets all of the statutory requirements described above, including the concern that MWAA raised, *i.e.*, that grant of the application would not result in an increase in the total number of slots per day at Reagan National.<sup>3</sup>

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<sup>2</sup> We will grant the motion.

<sup>3</sup> MWAA also correctly notes that the 2100 slots that may be moved to other times pursuant to this order will not become newly available for use in the 2100 period.

We noted in Order 94-9-49 that our authority to grant exemptions for slot slides at Reagan National is applicable only in limited circumstances to meet the specific needs of carriers holding a limited number of slots at that airport. Midwest Express currently operates only ten Reagan National slots, and it has demonstrated a need for the improved Washington-Milwaukee service that it will implement through the slot slide authorized here. The exemptions will enable Midwest Express to offer such service in both the local Milwaukee-Reagan National market and in connecting markets that Midwest Express serves beyond Milwaukee. For the latter markets, improved service to Reagan National will also strengthen Milwaukee as a competitive alternative hub, particularly for points in the Upper Midwest. Thus, the applicability of our slot exemption authority is appropriate under the exceptional circumstances Midwest Express has presented.

We do not agree with ACAA's assertion that other carriers did not have an opportunity to acquire the slots that Midwest Express obtained, nor do we agree that the slots should be recalled by the FAA and distributed through a lottery at this time. Pursuant to 14 CFR § 93.225, the FAA reserves the right to determine when a sufficient pool of slots is available for lottery.

The FAA has allocated eight air carrier slots in the 2100 hour time period on a temporary basis, subject to recall for a lottery. A number of these temporarily allocated slots in this time period have been available for several scheduling seasons. In addition, the FAA currently has five commuter slots in the 2100 hour that are allocated on a temporary basis and four currently unallocated commuter slots. There has not been a demonstrated unmet demand for operations at DCA in the 2100 hour. Consequently, these slots were available to any carrier (new entrant, limited incumbent and incumbent airline) who was willing to schedule service given that the agency may recall the slots if a viable pool of slots becomes available for lottery.

The FAA does not find it practical to hold a lottery solely for eight slots in the same hour. While new entrants and limited incumbents are given preference respectively in any lottery proceeding, the FAA does not believe that a new entrant would be able to introduce meaningful service by only using 2100 hour slots. Under the current slot regulations, if a lottery was held based on the eight 2100 air carrier slots, two slots would be reserved for new entrants and there currently are only two carriers that would qualify as a limited incumbent. Thus, the FAA does not find that recalling all temporarily allocated 2100 hour slots at this time warrants the disruption of service by certain carriers that are able to utilize these temporary allocations to complement their existing operations at the airport. However, the FAA will closely monitor the availability of slots at DCA and hold a lottery when sufficient slots become available.

The Department acknowledges that a new entrant/limited incumbent airline may obtain a 2100 hour slot from the FAA and subsequently petition for an exemption to retime those slots to other time periods. However, speculation on future Department action on

such a request does not warrant the disruption of current flights or changing long-standing FAA slot allocation policy to allocate available slots on a temporary basis.

## **ADMINISTRATIVE TERMS**

As the FAA slot regulation makes clear “slot(s) do not represent a property right but represent an operating privilege subject to absolute FAA control (and) slots may be withdrawn at any time to fulfill the Department’s operating needs...”

14 CFR 93.223(a). We also stipulate that operation of the Reagan National slot times at 1400 and 1500 authorized by this order must be used only to provide nonstop service between Milwaukee and Reagan National Airport. Since the slots are allocated on a temporary basis to Midwest Express, they are not transferable.

The Department is authorizing the movement of certain slot operations by this order on the ground that the services proposed by the applicant meet the statutory public interest and exceptional circumstances criteria. The Department reserves the right to modify or terminate such authority if the Department determines that, due to changed circumstances, these criteria are no longer satisfied by an applicant’s use of the authority.

This Order is issued under authority delegated in 49 CFR 1.56a(f)(1).

## **ACCORDINGLY,**

1. The Department grants an exemption from 14 CFR part 93, subparts K and S to Midwest Express Airlines, Inc. to the extent that Midwest Express will be allowed to move the operation of Slot Nos. 1087 and 1236 at Ronald Reagan Washington National Airport from the 2100 hour to the 1400-1459 period and the 1500-1559 period, respectively;
2. This exemption is granted only to the extent that Midwest Express is allowed to move the operation of Slot Nos. 1087 and 1236 for the purpose of providing nonstop service between Milwaukee, Wisconsin and Ronald Reagan Washington National Airport. Should Midwest Express operate these slots to provide service to a point other than Milwaukee, this exemption will expire and the operation of these slots will revert back to the 2100 hour. These slots are temporarily allocated to Midwest Express subject to recall by the FAA and are not transferable;
3. This exemption is granted only to the extent that Midwest Express is allowed to move the operation of Slot Nos. 1087 and 1236 and therefore, Midwest Express continues to be subject to all of the other requirements delineated in 14 CFR Part 93, Subparts K and S including, but not limited to, the reporting provisions and use or lose requirements;

4. We direct Midwest Express to contact the Federal Aviation Administration's Slot Administration Office to determine the startup date for the exemption granted here. The Federal Aviation Administration will assign slot numbers for the slot exemptions listed in ordering paragraph 1;

5. This exemption will become effective on February 1, 2000; and

6. We grant all motions to file otherwise unauthorized documents.

By:

**A. BRADLEY MIMS**  
Deputy Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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